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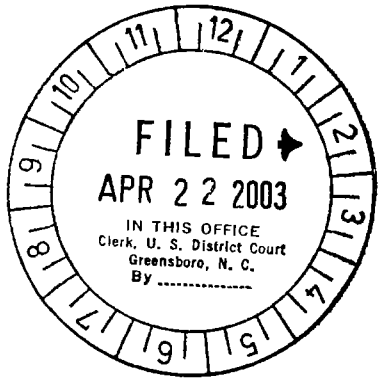
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

APAN BASU,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL NO. 1:03CV00098
	)	
ROBSON WOESE, INC.,	)	
	)	
Defendant.	)	



MEMORANDUM OPINION

BULLOCK, District Judge

This matter is before the court on Plaintiff's motion to remand. For the reasons set forth below, the court will deny Plaintiff's motion.

FACTS

In April 1999, Plaintiff Apan Basu, a citizen of North Carolina, signed an employment contract with Defendant Robson Woese, Inc. ("Robson"), a corporation duly licensed and authorized under the laws of the State of New York, with its principal place of business in East Syracuse, New York. Pursuant to this contract, Plaintiff accepted a position as an

"Engineering Manager" and "Engineer in Responsible Charge" of Robson's Raleigh-Durham office. (Pl.'s Mot. Remand Br. Opp'n Mot. Remove, Ex. D.) The parties included a "forum selection clause" in the contract. (Id. at p. 3.) On or about February 2, 2002, Plaintiff resigned his position with Robson.

On December 2, 2002, Plaintiff filed the present action in the General Court of Justice, Superior Court Division, Durham County, North Carolina, against Robson, asserting various state law claims arising out of the April 1999 contract. Plaintiff attempted to serve Robson by certified mail but the mailing was returned "unclaimed." (Id., Ex. A.) On December 31, 2002, Plaintiff served Robson's "Registered Agent" in the state of North Carolina by certified mail.[1] (Id., Ex. C.) On or about January 28, 2003, Robson filed a notice of removal to this court on the basis of diversity jurisdiction.

Plaintiff seeks to remand this case to Durham County Superior Court based upon two premises. First, Plaintiff claims that Robson lacks standing to remove the case because Robson "fails to admit" in its notice of removal that it was served with the complaint and that it is a party to the case. (Pl.'s Mot.

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[1]On January 24, 2003, the North Carolina Department of Secretary of State website listed Plaintiff as the "Registered Agent" for Robson. (Pl.'s Mot. Remand Br. Opp'n Mot. Remove, Ex. B.)

Remand Br. Opp'n Mot. Remove at ¶ 6.) Second, Plaintiff argues that the forum selection clause operates to waive Robson's right to remove this case.

DISCUSSION

Robson removed this action pursuant to 28 U.S.C. § 1441(a), asserting that the court has diversity jurisdiction under 28 U.S.C. § 1332. Robson, as the party seeking removal, bears the burden of establishing jurisdiction. See Mulcahey v. Columbia Organic Chems. Co., Inc., 29 F.3d 148, 151 (4th Cir. 1994). Because it is undisputed that complete diversity of citizenship between the parties exists and the amount in controversy exceeds $75,000.00, the requirements of 28 U.S.C. § 1332 are satisfied. Thus, the court must now examine whether Robson properly removed this case under both the applicable removal statutes and the April 1999 contract's forum selection clause.

Notice of Removal

Section 1441 provides that:

> any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States

> for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a). More specifically, 28 U.S.C. §1446 explains the procedure for removal.

> (a) A defendant or defendants desiring to remove any civil action . . . from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal . . . containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
>
> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based.

28 U.S.C. § 1446.

Plaintiff first contends that Robson lacks standing to remove this case because it failed to admit in its notice of removal that it had been "served" with the Complaint. Robson timely submitted to Plaintiff, Durham County Superior Court, and this court a notice of removal which contained a "short and plain statement" of the grounds for removal and attached pertinent pleadings. There is no further requirement in the removal statutes for Defendant to have been served or to admit to being served. To the contrary, Section 1446 provides that removal must be made within thirty days "after the receipt by the defendant,

through service or otherwise, of a copy of the initial pleading." 28 U.S.C. § 1446(b) (emphasis added). Although it denies receiving service of process, it is undisputed that Robson timely filed its notice of removal after receiving a copy of the initial pleading.[2]

Plaintiff next argues that Robson's removal was improper because it did not "admit that he [sic] is a 'party.'" (Pl.'s Mot. Remand Br. Opp'n Mot. Remove at ¶ 6.) There is no requirement in the applicable statutes that a defendant admit that it was properly served and thus a "party" to the action. Both Sections 1441 and 1446 limit the right to remove to "defendants." It is undisputed that Plaintiff intended Robson to be a named defendant in this lawsuit. Furthermore, in its notice of removal, Robson referred to itself as "Defendant" no less than fourteen times. As only defendants can remove under the applicable statutes, Robson, as a properly named defendant, has

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[2]Robson claims that it was never notified by Plaintiff that service was effected on Robson by Plaintiff serving himself as Robson's Registered Agent. (Def.'s Resp. Opp'n Pl.'s Mot. Remand at 1.) Robson claims that its first notice of this case occurred when it received a pleading in response to a breach of contract action (arising out of the same contract, facts, and circumstances as in the present case) originally filed by Robson in the United States District Court for the Eastern District of North Carolina against Plaintiff. (Id.) At the hearing before the court on April 21, 2003, Defendant advised the court that it was not contesting sufficiency of service. Defendant filed an answer and counterclaim to Plaintiff's complaint on February 28, 2003.

standing to remove this case. Moreover, because its representations in the notice of removal comply with the requirements of Sections 1441 and 1446, Robson properly removed the present case to this court.

Forum Selection Clause

Plaintiff contends that the forum selection clause contained in the April 1999 contract between Robson and Plaintiff operates to waive Robson's right to remove this case to this court. The forum selection clause in its entirety provides:

> In case of litigation, in respect to this Agreement, North Carolina law will apply and any suit shall be filed in the North Carolina General Court of Justice in Durham County or in the United States District Court for the Middle District of North Carolina and parties to the Agreement consent to the exclusive jurisdiction and venue in said Courts.

(Pl.'s Mot. Remand Br. Opp'n Mot. Remove, Ex. D at ¶ 3.) Plaintiff points out that the clause states that any contractual dispute may be brought in either the United States District Court for the Middle District of North Carolina or the Superior Court for Durham County, North Carolina. Thus, Plaintiff contends that because the Superior Court for Durham County was "the first Court to obtain jurisdiction under the terms of the Contract," it "retains jurisdiction of this matter." (Id. at ¶ 10.)

Although the right of removal is a statutory right, this right may be waived. For the waiver to be enforceable, however, it must be "clear and unequivocal." Grubb v. Donegal Mut. Ins. Co., 935 F.2d 57, 59 (4th Cir. 1991). A forum selection clause may operate as such a waiver. See Black & Decker (U.S.), Inc. v. Twin City Fire Ins. Co., 1993 WL 56784, at *3 (D. Md. Feb. 9, 1993). There is a presumption that forum selection clauses are valid and enforceable. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10-11 (1972). It is clear, however, that the party enforcing the forum selection clause bears the burden of proving it is enforceable in the manner sought. Id. In this case the burden of proof falls on Plaintiff.

Forum selection clauses can be either "permissive" or "mandatory." Scotland Mem'l Hosp., Inc. v. Integrated Informatics, Inc., 2003 WL 151852, at *3 (M.D.N.C. Jan. 8, 2003). "A permissive forum selection clause, which is perhaps more appropriately known as a 'consent to jurisdiction' clause, specifies the court empowered to hear any litigation arising from the contracting parties, in effect waiving any objection to personal jurisdiction in a venue." Id. (quoting S & D Coffee, Inc. v. GEI Autowrappers, 995 F. Supp. 607, 609 (M.D.N.C. 1997)). Alternatively, a mandatory forum selection clause "identifies a particular state or court as having exclusive jurisdiction over

disputes arising out of the parties' contract and their contractual relationship." Id.

The forum selection clause at issue in this case employs "exclusive" language. Both parties consented to "exclusive jurisdiction and venue" in the forum selection clause. At the same time, however, the parties also named more than one court to serve as the "exclusive" jurisdiction and venue. Thus, the dispositive issue is whether Robson clearly and unequivocally waived its right to remove this case to federal court by entering a contract which contains a forum selection clause limiting jurisdiction and venue to state or federal court within the same geographical region.[3] Although the Fourth Circuit and this court have yet to address this issue squarely, numerous other courts have done so. See Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A., 760 F.2d 390, 397 (2d Cir. 1985) (holding that "a forum selection clause that merely puts jurisdiction in either a federal or a state court does not constitute [a] . . . waiver of the . . . right to remove"); Amerilink Corp. v. Cerco, 1996 WL 238525 (E.D. Mo. May 3, 1996); Newman/Haas Racing v. Unelko Corp., 813 F. Supp. 1345, 1347 (N.D. Ill. 1993).

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[3]Durham County is included in the Middle District of North Carolina.

Plaintiff argues, however, that these cases are distinguishable because they dealt with the issue of waiver and Plaintiff is arguing an issue of estoppel. Plaintiff contends that the forum selection clause, written by Robson, identifies the two courts in which jurisdiction and venue are proper for any lawsuit filed concerning the April 1999 contract. Instead of arguing that Robson has waived its right to remove under the forum selection clause, however, Plaintiff claims that Robson is estopped form removing a case to this court because it has already consented to jurisdiction and venue in the state court. Plaintiff seems to be arguing that Robson is effectively withdrawing its consent to jurisdiction and venue in state court by attempting to remove the case to this court. Because he first brought this case in a contractually agreed upon jurisdiction and venue, Plaintiff claims that Robson is estopped from removing the case.

While this argument is somewhat different from those found in the typical forum selection case, it encounters the same difficulty. Regardless of the argument, a defendant still has a right to removal unless it has clearly and unequivocally waived this right. Although Robson has limited its right of removal to this court under the forum selection clause, it has not waived this right. "[W]here a contract provides that the parties

consent to jurisdiction of a state or a federal court within a particular region, the agreement does not constitute a waiver of a defendant's right to remove." Newman/Haas Racing, 813 F. Supp. at 1347.

Because the language of the forum selection clause in this case does not contain a waiver, the court finds that the unambiguous forum selection clause contained in the April 1999 contract between Robson and Plaintiff does not prevent Robson's removal to this court.

CONCLUSION

Because Robson's notice of removal satisfied the applicable removal statutes, complete diversity exists between the parties, and the forum selection clause in the April 1999 contract does not operate as a waiver, Robson's removal to this court is proper. As a result, Plaintiff's motion to remand will be denied.

An order in accordance with this memorandum opinion shall be entered contemporaneously herewith.

April 22, 2003

United States District Judge